

Robert J. Huston, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
John M. Baker, *Commissioner*
Jeffrey A. Saitas, *Executive Director*



FILE # ML-41913-01
I.D. # 41913

RECEIVED
TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Protecting Texas by Reducing and Preventing Pollution
March 5, 2001

MAR 08 2001

OPINION COMMITTEE

RQ-0363-JC

RECEIVED

MAR 07 2001

OPEN RECORDS DIVISION

The Honorable John Cornyn
Office of the Attorney General
Price Daniels Building, 6th Floor
210 W. 14th Street
Austin, Texas 78701

FILE # _____
I.D. # _____

RE: Request for Attorney General opinion on the constitutionality of section 26.179 of the Texas Water Code.

Dear Attorney General Cornyn:

The Texas Natural Resource Conservation Commission (TNRCC) respectfully requests an opinion from the Attorney General addressing whether the current version of Texas Water Code section 26.179 is constitutional.

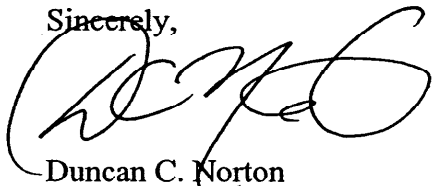
On June 15, 2000, the Supreme Court held that section 26.179 violated the Texas Constitution, in *FM Properties Operating Company v. City of Austin*, No. 98-0685 (Tex. 2000) (Attachment 1). The Court, however, was reviewing the statute as it existed in 1995. In 1999, the legislature amended section 26.179, making revisions to subsections (c), (d), (e), (g) and (h). Tex. S.B. 1165, 76th Leg., R.S. (1999) (Attachment 2); Tex. H.B. 2932, 76th Leg., R.S. (1999) (Attachment 3). In *FM Properties*, the Court noted that the 1999 amendments did not apply to the case. *FM Properties*, footnote 1; *see also* dissent by Justice Abbot, section I ("The Court appropriately has not said that the amended act is unconstitutional."). Thus, the Court left open the question whether section 26.179 is constitutional in its current form.

This question is important to the TNRCC because the TNRCC is charged with administering section 26.179. Section 26.179 of the Texas Water Code allows landowners of contiguous tracts of at least 500 acres within certain municipalities' extraterritorial jurisdictions to designate their property as "water quality protection zones" (WQPZ). *See* TEX. WATER CODE § 26.179 (Vernon 2000). Those wishing to create a WQPZ must apply to the TNRCC, which must review, and approve or deny, the applications within 120 days. 30 TEX. ADMIN. CODE § 216.3. Additionally, on April 1 of each year, the TNRCC collects an annual compliance and inspection fee for each WQPZ. 30 TEX. ADMIN. CODE §§ 216.11(b), 216.8.

Given that the TNRCC is required to timely process applications and to collect annual fees, it is critical to know whether section 26.179 is constitutional. In addition, the TNRCC is planning to complete the rules review of Chapter 216 of our rules by August 31, 2001, which will require us to determine whether to readopt or to repeal the rule. Thus, the TNRCC requests an opinion on the constitutionality of Texas Water Code section 26.177.

If you have any questions, please contact me at 239-5525.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Norton", written over a circular scribble.

Duncan C. Norton
General Counsel

Enclosure

cc:(without enclosure)

Karen Kornell, Chief, Natural Resources Division, Office of the Attorney General

Lisa Richardson, Assistant Attorney General, Office of the Attorney General